UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. CASE NO: 8:09-cv-87-T-26TBM

ARTHUR NADEL; SCOOP CAPITAL, LLC; and SCOOP MANAGEMENT, INC.,

Defendants,

SCOOP REAL ESTATE, L.P.; VALHALLA INVESTMENT PARTNERS, L.P.; VALHALLA MANAGEMENT, INC.; VICTORY IRA FUND, LTD.; VICTORY FUND, LTD.; VIKING IRA FUND, LLC; VIKING FUND, LLC; and VIKING MANAGEMENT, LLC,

Relief Defendants.
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O R D E R

Iberiabank (the Bank), a non-party to this case, has filed an objection and motion for protective order with regard to a subpoena duces tecum served by the Receiver requesting documents pertaining to the account of one of its customers, Marguerite Nadel (Nadel). The Court has directed the Receiver to file an expedited response and has scheduled the matter for an expedited hearing.[1] Upon further reflection, however, the

[1] See dockets 465 and 466.

Court is of the opinion that the motion is due to be denied thus obviating the need for a response and a hearing.

The Bank's sole basis for challenging the subpoena is that Florida law prohibits it from producing the documents without the prior consent of Nadel, which the Bank claims has not been received, citing principally Winfield v. Division of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985)[2] and section 655.059(2)(b) of the Florida Statutes.[3] The problem with the Bank's argument is that under the circumstances presented by this case, this Court is not obliged to follow and apply Florida's statutory and case law with respect to the privilege of non-disclosure afforded to records in the custody and control of financial institutions. Another problem with the Bank's position is that even if Florida law did apply, it is not entitled to relief.

Federal Rule of Evidence 501 governs evidentiary privileges in federal courts. Under that rule, such privileges are determined "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The rule then provides an exception: "[h]owever, in civil actions and

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[2] In Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla. 1985), the Florida Supreme Court, relying on article I, section 23 of the Florida Constitution, which provides for a right of privacy with respect to governmental intrusion, found "that the law in the state of Florida recognizes an individual's legitimate expectation of privacy in financial institution records."

[3] This statutory subsection generally mandates the confidentiality of financial institution records subject to certain exceptions, one of which will be discussed later in the body of this order.

proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." In this case, Plaintiff's complaint asserts only federal claims based on violations of the Securities Act of 1933 and the Securities Exchange Act of 1934.[4] Consequently, any privilege provided by Florida law which would insulate Nadel's account documents from being the subject of a subpoena and resulting production by the Bank does not bind this Court. See American Civil Liberties Union of Mississippi, Inc. v. Finch, 638 F.2d 1336, 1342 (5th Cir. Unit A 1981).[5]

Moreover, even if this Court were to follow Florida law, the result would not change. Winfield was decided within the context of *governmental* intrusion into the private life of a citizen by a state agency's issuance of a subpoena for bank records without notice. Such is not the case here. Additionally, the Bank overlooks the clear and unambiguous language of another subsection of section 655.059, subsection 1(e), which provides in pertinent part that, although confidential, "[t]he books and records of a financial institution . . . shall be made available for inspection and examination only: As

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[4] See docket 1 (Plaintiff's complaint).

[5] As the Eleventh Circuit recently noted, "[i]n Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), this Court adopted as binding precedent decisions of the Fifth Circuit, including Unit A panel decisions of that circuit, handed down prior to October 1, 1981." W.R. Huff Asset Mgt. Co., L.L.C. v. Kohlberg, Kravis, Roberts & Co., L.P., 566 F.3d 979, 985 n.6 (11th Cir. 2009) (citation omitted). Accordingly, Finch is binding precedent.

compelled by a court of competent jurisdiction, pursuant to a subpoena issued pursuant to the . . . Federal Rules of Civil Procedure," which is precisely the case before the Court.

Finally, although the Court is aware of its authority under Rule 501 to recognize new or novel evidentiary privileges, "the rule in this Circuit is that a new privilege should only be recognized where there is a 'compelling justification.'" In re Int'l Horizons, Inc., 689 F.2d 996, 1004 (11th Cir. 1982) (citation omitted). There is no such compelling justification presented by this case to recognize a privilege protecting Nadel's bank records from being subpoenaed from and produced by the Bank inasmuch as the United States Supreme Court has held that there is no legitimate expectation of privacy in the context of banking records. See United States v. Miller, 425 U.S. 435, 442, 96 S.Ct. 1619, 1623-24, 48 L.Ed.2d 71 (1976). And, although Congress abrogated Miller in part by enacting the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, limiting the government's ability to acquire an individual's personal financial information, nevertheless, Miller's "application to civil matters remains authoritative." Robertson v. Cartinhour, 2010 WL 716221 at *2 (D. Md. 2010) (citing Clayton Brokerage Co. v. Clement, 87 F.R.D. 569, 571 (D. Md. 1980) (footnote omitted); see also Securities and Exchange Comm'n v. W Financial Group, LLC, 2009 WL 636540 (N.D. Tex. 2009) (recognizing that there generally is no legitimate expectation of privacy in the contents of checks, deposit slips, or bank statements in a bank's possession) (citing and quoting Najjar v. United States, 2003 WL 21254772 at *2 (S.D. Ind. 2003)).

ACCORDINGLY, the Bank's Motion for Protective Order (Dkt. 463) is **denied**. The Bank shall comply with the Receiver's subpoena duces tecum. The hearing scheduled on this motion for Friday, August 27, 2010, at 8:30, is cancelled.

DONE AND ORDERED at Tampa, Florida, on August 19, 2010.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record